



Statement of David Quam
Director, Federal Relations, National Governors Association

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Governmental Affairs

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The Impact of Implementation: A Review of the REAL ID Act and the Western
Hemisphere Travel Initiative

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Chairman Akaka, Ranking Member Voinovich and distinguished members of the subcommittee, my name is David Quam and I am the director of federal relations for the National Governors Association (NGA). I appreciate the opportunity to appear before you today on behalf of NGA to discuss the issues surrounding state implementation of REAL ID and the Western Hemisphere Travel Initiative. While both issues are critical for states, most of my testimony will focus on REAL ID.

OVERVIEW:

The position of the National Governors Association regarding REAL ID remains “fix and fund.” REAL ID should be fixed through regulatory and, if necessary, congressional action to ensure it is workable, cost-effective and actually enhances the security and integrity of state driver’s licenses and identification cards. Final regulations for REAL ID were released on January 11 of this year, a mere four months before the statutory compliance deadline of May 11, 2008. The regulations include significant changes to the initial notice of proposed rulemaking to address state concerns and recommendations. These changes have moved REAL ID from the realm of the improbable to the possible, but significant questions remain before REAL ID is fully fixed.

REAL ID also must be funded. For the first time in our nation’s history the federal government is setting national standards for state driver’s licenses. If the federal government is going to regulate state practices over traditional state functions such as driver’s licenses and identification cards, then the federal government should pay the states’ cost of compliance. Governors have called on the Administration and Congress to demonstrate the priority they place on REAL ID by fully funding the program. Specifically, Congress should provide \$1 billion to cover the up-front cost of REAL ID this year and commit to providing additional funds to offset the ongoing costs of meeting this federal mandate.

BACKGROUND:

Congress passed the REAL ID Act (REAL ID) as part of the Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief Act (P.L. 109-13). The law replaced section 7212 of the Intelligence Reform Act (P.L. 108-458), which established a negotiated rule making to determine national standards for state driver’s license and identification cards (DL/IDs). NGA supported the compromise contained in section 7212 because it allowed stakeholders, including governors, to participate in the process of reforming what traditionally has been a state function.

Although the negotiated rulemaking already had begun, REAL ID repealed the provision and replaced it with statutory standards, procedures and requirements that must be met if state-issued DL/IDs are to be accepted as valid identification by the federal government. REAL ID’s mandates will alter long-standing state laws, regulations and practices governing the qualifications for and the production and issuance of DL/IDs in every state. Complying with these new standards will require significant investments by states and the federal government and test the resolve of citizens who will be directly affected by changes to state systems.

To ensure states, Congress and the federal government understand the fiscal and operational impact of altering these complex and vital state systems, the American Association of Motor Vehicle Administrators (AAMVA), in conjunction with NGA and the National Conference of

State Legislatures (NCSL) conducted a nationwide survey of state motor vehicle agencies. Based on the survey results NGA, NCSL and AAMVA issued a report in September 2006 concluding that REAL ID will cost states more than \$11 billion over five years, negatively affect services to the public and impose unrealistic burdens on states to comply with the act by the statute's May 2008 deadline. The report also identified key components of REAL ID that will have the greatest impact on states and citizens and made specific recommendations for Congress and the Department of Homeland Security (DHS) to follow if REAL ID is to succeed. [A copy of the report can be found on the NGA Web site at www.nga.org/Files/pdf/0609REALID.PDF.]

Regulations:

DHS formally published its notice of proposed rulemaking (NPRM) on REAL ID on March 9, 2007. While the NPRM incorporated several of the recommendations made by states, four major requirements continued to present critical challenges for states: 1) the need to re-enroll all 245 million DL/ID holders over five years; 2) increased verification requirements for identification documents; 3) new document design mandates; and 4) changes to business and support practices that reduce efficiencies and customer service.

In response to the NPRM, NGA reiterated the following major recommendations:

- Extend the compliance deadline;
- Provide funds necessary for states to comply with REAL ID;
- Grant the Secretary of Homeland Security the flexibility to recognize innovation at the state level;
- Implement a 10-year, progressive re-enrollment schedule;
- Allow reciprocity for persons already vetted by the federal government;
- Provide the federal electronic verification systems necessary to comply with the law;
- Require states to employ electronic verification systems only as they become available;
- Adopt uniform naming conventions to facilitate electronic verification between files; and
- Establish card security criteria based on performance—not technology.

On Friday, January 11, 2008, DHS released its final rule for meeting the requirements of REAL ID. The final rule incorporates many of the recommendations made by states, including the adoption of a 10-year compliance timeline that establishes milestones for states and provides some flexibility to manage the driver's license applicant pool.

Specifically, the rule requires all states to be in compliance with REAL ID on May 11, 2008, unless they obtain an extension from DHS. States were given until March 31, 2008, to request an extension. To reinforce the deadline, DHS made it clear that if a state failed to negotiate an extension, that state's DL/ID cards could not be used for identification purposes to board commercial aircraft. Although all states were eventually granted an extension, several governors, especially those from states with laws or resolutions opposing REAL ID, did not appreciate this Hobson's choice.

If states demonstrate they have achieved certain milestones towards compliance (18 milestones are identified in the rule), but have not reached full compliance by December 31, 2009, states may request a second extension from DHS until May 11, 2011. After May 11, 2011, states are

expected to issue fully compliant REAL ID cards. In other words, the regulations anticipate all electronic systems will be operational by May 2011. Thereafter states will have until December 1, 2014, to issue REAL ID compliant drivers' licenses and ID cards to individuals born after December 1, 1964, and until December 1, 2017, for those born on or before December 1, 1964.

Cost Estimates:

The Office of Management and Budget (OMB) estimates that the new rule will cost states more than \$3.9 billion over 11 years. This estimate is far less than OMB's \$14.6 billion estimate associated with the NPRM. The dramatic reduction in costs comes primarily from the adoption of the 10-year window for re-enrollment and performance-based rather than mandated security requirements. By allowing states more time to process applicants, states can better manage resources and reduce costs. Likewise, flexibility in choosing security options for their cards allows states to maximize security and cost effectiveness by choosing technologies that work best for them.

OMB's estimate also benefits from its new assumption that only 75 percent of all drivers will actually receive a REAL ID. While not all drivers may elect to get a REAL ID, OMB's assumption that one in four drivers will opt for another form of identification is questionable. Under REAL ID, states may provide alternative non-REAL ID compliant cards, but states may also seek savings by only offering REAL ID compliant DL/IDs. If more than 75 percent of drivers and identification card holders elect to get REAL IDs, states' actual cost could easily exceed OMB's estimates.

Appropriations:

To date, Congress has appropriated only \$90 million for REAL ID: It appropriated \$40 million in 2005 when the act was passed and added another \$50 million in REAL ID grants to states as part of the Fiscal Year (FY) 2008 Omnibus Appropriations Bill.

To supplement these amounts, DHS Secretary Chertoff has authorized states to use up to 20 percent of their State Homeland Security Grant Program (SHSGP) funds for REAL ID. This authority, however, does little to offset the cost of the program because states must distribute 80 percent of all SHSGP funds to local governments. A state's use of 20 percent of state SHSGP funds for REAL ID would therefore limit available resources for other state homeland security priorities.

Also undermining the usefulness of SHSGP to help pay for REAL ID is the fact that funding for SHSGP has fallen from its original level of \$1.1 billion in FY 2005 to \$550 million in FY 2006 and \$525 million in FY 2007. The President asked for only \$200 million for the program in FY 2008 before Congress increased funding to \$950 million. The Administration's FY 2009 budget again calls for a mere \$200 million for SHSGP.

Finally, as part of its FY 2009 budget, the Administration proposed a \$110 million competitive grant program for states in part to assist with REAL ID, and \$50 million for DHS to develop verification capabilities. While appreciated, these amounts constitute a fraction of the projected cost of REAL ID.

Grants:

Of the \$90 million appropriated, DHS has awarded \$7 million in grants to Kentucky as part of two pilot projects to check birth certificates via the Electronic Verification of Vital Events database. All remaining funds (\$79.9 million) are to be distributed using the FY 2008 REAL ID Demonstration Grant Program guidelines, which were published on December 18, 2007. The guidelines outline a competitive grant process favoring proposals to work with AAMVA in the building of a “hub” system to facilitate electronic verification.

Applications for REAL ID grants were originally due March 7, 2008. Following the NGA Winter Meeting in February 2008, governors expressed concern that the few funds appropriated to help states implement REAL ID were instead being used to fund a competitive grant program aimed at achieving a DHS priority of building a hub. NGA joined with NCSL and AAMVA to request that the grant application deadline be extended by at least 30 days to provide time for governors and DHS to discuss the goals and implementation of the grant program. The application deadline was extended to April 4, 2008. During the extension governors stressed the need for the federal government to fully fund the cost of REAL ID and allocate existing grant funds among all states to assist in implementation. DHS is expected to announce its REAL ID grant awards over the next several weeks.

CONCERNS AND RECOMMENDATIONS:

Governors are committed to providing their citizens with secure driver’s licenses and identification cards. To that end governors have consistently offered constructive recommendations for implementing REAL ID. DHS is to be commended for listening to governors’ concerns and incorporating several of the recommendations into the final regulations. That being said, governors continue to have serious questions about how proposed electronic verification systems will operate, how individual information will be protected and secured, what the actual costs of REAL ID will be for states and how those costs will be funded.

Electronic verification:

The ability to electronically verify identifying information is the cornerstone of REAL ID and the most uncertain element of the act. The final regulations identify five systems that will be required to make REAL ID work: Social Security On-Line Verification (SSOLV), Electronic Verification of Vital Events Records (EVVER), Systematic Alien Verification for Entitlements (SAVE), an all-drivers system run by the states to ensure an applicant is not licensed in another state and a system run by the U.S. State Department to verify foreign passport information. DHS envisions these systems being linked by a hub system that will bridge federal and state systems; allow for timely, dependable and accurate transmission of information; secure personal data; and protect against unauthorized use and identity theft. Creation of the hub is a top priority for DHS because it is critical for making electronic verification feasible.

The uncertainty surrounding electronic verification stems from the fact that states do not know precisely how the systems will work, how they will integrate together or what protections will apply for the security of data. In particular, the hub will require extensive development of governance systems and security protocols to ensure the transfer of timely, accurate and secure information. Back up systems and practices also must be developed for those instances in which

the hub or one of the corresponding databases is not functioning. In addition, all systems must comply with federal and state privacy laws.

These uncertainties have led several states to oppose REAL ID and others to question whether all systems can be ready by 2011 as contemplated by the regulations. They also raise concerns with regard to cost since system development, testing and deployment must all be completed before the first fully compliant REAL ID is ever produced. Development of comprehensive governance and business plans that detail the operations, cost and security features of the electronic verification systems must be completed before states can fully evaluate the benefits and risks of complying with REAL ID.

Recommendations:

- **DHS must prioritize the development of comprehensive business plans, governance systems, security protocols and initial and ongoing cost estimates for all electronic verification systems.**
- **Federal priority projects should be paid for with dedicated federal funds. For example, the hub serves a primarily federal purpose and should be funded with the \$50 million requested by the President in his FY 2009 budget for “verification capabilities” rather than state grant funds or user fees.**

Privacy:

The privacy and security of individual records remains a critical concern for governors and citizens. Although DHS took strides to reduce threats to privacy by limiting the amount of information available on driver’s licenses and identification cards, privacy concerns will remain an issue until detailed business plans and security systems are developed to assure states that data from state and federal systems is secure.

Recommendation:

- **Congress should closely monitor the development of comprehensive governance and security plans to ensure the protection of individuals’ personal information and compliance with state and federal privacy laws.**

Cost:

States are concerned that OMB’s cost estimates do not take into account several elements. For example, the estimates do not include the need for new manufacturing and distribution centers or the retrofitting of existing distribution centers, to meet security protocols. OMB’s projected costs also fail to account for transaction costs of soliciting responses from the five verification systems. In fact, DHS just recently increased the per-query transaction cost for SAVE transactions, potentially doubling the cost of each query to the system.

With most of the data systems still in the development stage, it is impossible to estimate the total transactional cost of verification, let alone the ongoing cost of operating such systems. With more than 245 million drivers and identification card holders in the United States, these unknowns are cause of significant concern as states plan their budgets and determine whether to proceed with REAL ID.

Recommendation:

- **Congress should call for updated cost projections that include all costs associated with REAL ID, including transaction costs for electronic verification and increased security at driver's license distribution and manufacturing centers.**

State Grants:

Governors' primary objection to the REAL ID Demonstration Grant Program was that it took funds appropriated to assist states with the implementation of REAL ID and channeled them toward a DHS priority. Each state that chooses to implement REAL ID will have different needs. Determining how to allocate resources to meet the requirements of REAL ID should be left to the states.

Additionally, grant awards should not be predicated on a commitment to fully comply with REAL ID. By creating a 10-year window for implementation, DHS recognized that many of the systems required to make REAL ID work do not yet exist. The uncertainty surrounding the development of these systems with regards to security, privacy, operations and cost make it unreasonable to tie funding awards to promises of full implementation.

Recommendations:

- **Funds to assist states with compliance should be provided to states on a flexible, formula basis to allow states to determine which investments best meet the requirements of the act.**
- **Grant awards should not be conditioned on a promise to fully comply with REAL ID until DHS determines what full compliance entails.**

Funding:

Governors call on the federal government to "fund" REAL ID by providing federal dollars to offset state expenditures for meeting new federal standards. The funds appropriated for REAL ID to date and those called for in the President's budget are insufficient to meet the needs of states. REAL ID is a mandate on states that should be paid for by the federal government.

Recommendation:

- **Congress and the Administration must work together to provide \$1 billion for states this year to cover states' upfront costs of compliance and commit to covering the ongoing costs of REAL ID.**

WESTERN HEMISPHERE TRAVEL INITIATIVE:

The Intelligence Reform and Terrorism Prevention Act of 2005 (P.L. 108-458) required the Secretary of Homeland Security, in consultation with the Secretary of State, to develop a plan to require U.S. citizens and foreign nationals entering (or re-entering) the United States from the Western Hemisphere to carry a passport or other document "sufficient to denote identity and

citizenship.” To meet this statutory requirement, the DHS and the Department of State developed the Western Hemisphere Travel Initiative (WHTI).

Governors recognize that promoting homeland security and international economic activity are compatible goals and that homeland security needs should be addressed in a way that facilitates international trade, tourism and travel. Governors, particularly those in border states, are essential partners in facilitating cross-border commerce and implementing security measures such as the WHTI that are intended to increase safety and security at the border. As such, it is critical that the federal government consult with states whenever security-oriented legislation or agency actions impact the flow of commerce and traffic across United States borders to ensure that such initiatives both protect the public and minimize unnecessary burdens on international travel, tourism, and trade.

An example of the type of cooperation that can yield meaningful results is the enhanced driver’s license pilot project in the state of Washington. Washington developed this project, in conjunction with the U.S. Departments of State and Homeland Security, to facilitate the entry (or re-entry) of its residents to the United States from Canada. Washington residents interested in participating in this voluntary program are able to use their Washington State Enhanced Driver’s License (EDL) in lieu of a passport for crossing the U.S.-Canadian border.

The Washington Department of Licensing began issuing EDLs earlier this year. Washington authenticates these documents by requiring proof of residence, identity and citizenship acceptable to DHS. Residents pay a fee to cover the cost of inclusion of a radio frequency identification chip in the EDL to facilitate rapid identification checks at border crossings.

Governors are encouraged by the progress of the Washington project and will continue to examine it for possible use in their own states. Governors encourage the federal government to continue to explore opportunities and technologies to facilitate border crossings by developing frequent-border-crossing programs as well as acceptable passport substitutes to establish travelers’ identities and nationalities.

CONCLUSION:

Since its passage, governors have offered several constructive recommendations for implementing REAL ID. Governors have encouraged DHS and Congress to “fix” the act by implementing statutory or regulatory changes to make REAL ID feasible and cost-effective. They also have called on the federal government to “fund” REAL ID by providing federal dollars to offset state expenditures for meeting new federal standards.

Governors’ “fix and fund” policy is not separable. Workable regulations without full federal funding are no more palatable or useful than unworkable regulations with full federal funding. As WHTI has shown, states are willing to work with the federal government to find solutions that are practical, cost-effective and enhance the security of the nation. If REAL ID is to be fully implemented, Congress and the Administration must work collaboratively with states to develop workable systems and fund states’ costs of complying with REAL ID.